Supreme Court, U.S.
FILED

No 03 470 SEP 26 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL L. MERRITT,

Petitioner,

vs.

JANE A. MERRITT,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

CHARLES GAUNCE
Attorney at Law
202 Canyon Terrace
El Paso, Texas 79902
(915) 838-8902

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

43 P

QUESTION PRESENTED FOR REVIEW

42 U.S.C. § 407(a) provides that Social Security benefits are not subject to "execution, levy, attachment, garnishment, or other legal process." This case presents the following question:

When Social Security benefits are paid directly to a child after that child reaches the age of majority, are the Social Security benefits thus paid properly considered as payment for child support owed to the custodial parent during the minority of the child?

PARTIES TO THE PROCEEDING

Petitioner:

Michael L. Merritt is an individual.

Respondent:

Jane A. Merritt is an individual.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Citations of Reports of Opinions Entered in the Case 1

Basis for Supreme Court Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Argument 5

Appendices

Oklahoma Supreme Court Opinion, 73 P.3d 878 (July 1, 2003) A-1

Oklahoma Court of Civil Appeals Opinion (May 17, 2003) A-20

Order of the District Court of Cleveland County, Oklahoma on Petitioner's Motion to Reconsider (December 14, 2000) A-26

Journal Entry of Judgment of the District Court of Cleveland County (November 16, 2000) A-28

TABLE OF AUTHORITIES

Page

CASES

Nibs v. Nibs, 625 P.2d 1256 (Okla. 1981) 5, 7

Washington Dept. of Social and Health Srvcs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 6

Wilson v. Stenwall, 868 P.2d 1317 (Okla. App. 1992) 7

STATUTES

28 U.S.C. § 1257(a) 1

42 U.S.C. § 407(a) 1, 4, 6, 7

42 U.S.C. § 654(4)(B)(ii) 2, 6

42 U.S.C. § 659(a) 2, 4

CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the Oklahoma Supreme Court is reported at 2003 OK 68, 73 P.3d 878. App. at A-1.[1] The opinion of the Oklahoma Court of Civil Appeals, App. at A-20, the order of the District Court of Cleveland County, Oklahoma on Petitioner's Motion to Reconsider, App. at A-26, and the Journal Entry of Judgment of the District Court of Cleveland County, Oklahoma, App. at A-28, are unpublished.

BASIS FOR SUPREME COURT JURISDICTION

The opinion of the Oklahoma Supreme Court was entered July 1, 2003, App. at 1. No motion for reconsideration was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 407(a), provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

[1] "App." refers to the Appendix To the Petition For A Writ Of Certiorari bound herewith.

42 U.S.C. § 654(4)(B)(ii) provides: "A State plan for child and spousal support must – provide that the State will – enforce any support obligation established with respect to – the custodial parent of such a child."

42 U.S.C. § 659(a), provides: "Notwithstanding any other provision of law (including section 407 of this title and section 5301 of title 38), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 666 of this title and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

STATEMENT OF THE CASE

The parties were granted a divorce on October 16, 1987. After several modifications of the decree as to the custody of the minor child of the parties, the trial court ordered, that the mother pay $120.00 per month as child support to the father.

In 1996, the court further modified the custody provisions by terminating the parental rights of the mother.

Subsequently, the father sought an indirect contempt citation alleging that the order for the payment of child support remained in full force and effect. The application alleged that the mother failed to make payments beginning in March 1996, and missed all but two months until he filed his application for contempt on January 31, 2000. He claimed that the mother was indebted to him in the amount of $5,400.00 for child support, plus interest on that amount. The father filed his application one day before the parties' son attained majority.

After filing the application for indirect contempt citation, the mother filed an application for Social Security disability benefits payable on behalf of the minor child for her disability as determined in November of 1999. Social Security approved payment of the child's benefits and subsequently paid the benefits directly to the adult child of the parties. Mother then moved to dismiss the father's application for contempt asserting the payment of the Social Security benefits to the child as purging the contempt. The trial court heard the mother's motion to dismiss on November 1, 2000. The court found that the mother had failed to pay the court-ordered child support as alleged by the father. The court further found that the mother had been legally disabled since May 1997, and that the Social Security Administration made a payment of $13,101.00 directly to the child of the parties on June 2, 2000, and had paid $355.00 per month directly to the child of the parties every month since that time. Those payments represented Social Security benefits payable to the child as a result of the mother's disability. The sums paid by Social Security were in excess of the sum claimed as delinquent child support by the father in his application for an indirect contempt citation.

The trial court made the following findings: Equity required the application of the equitable estoppel doctrine to the father's claim for delinquent child support; the mother's disability, and the Social Security benefit payments of a lump sum and monthly payment made in excess of the delinquent child support supported this decision; and the mother was not responsible for the payment of the lump sum directly to the adult child of the parties by the Social Security Administration. The journal entry of judgment stated that the father should seek reimbursement of the child support he sought in his motion from his adult son by having a constructive trust imposed on the benefits paid to the adult son to the extent of the unpaid child support while the child was a minor. The court granted the motion to dismiss the indirect contempt citation and also dismissed the father's motion to reduce arrearage to judgment.

Father timely filed a motion to reconsider with the trial court setting forth the provisions of 42 U.S.C. § 407(a) to advise the court that the father had no recourse for child support against the funds paid to the child by Social Security. Mother cited 42 U.S.C. § 659(a) for the proposition that it expressly permits Social Security benefits to be subject to withholding for child support obligations. Father responded that 42 U.S.C. § 659(a), to be applicable, requires the payee of the Social Security benefits to be obligated to pay child support and, as the child was not so obligated, the benefits were not subject to withholding. The trial court denied the father's motion to reconsider, App. A-26.

Father appealed, and the Oklahoma Court of Civil Appeals reversed, expressly holding that 42 U.S.C. § 407(a) prohibits the father from seeking reimbursement

of the child support owed by the mother from the Social Security payments made to the child.

Mother appealed to the Oklahoma Supreme Court and that court found that Social Security benefits had been paid for child support, the amount paid was in excess of the child support arrearage, and the mother is entitled to credit for the payment made, on the theory that equity permits the substitution of Social Security disability benefits for child support for the period during which such benefits are paid, citing *Nibs v. Nibs*, 625 P.2d 1256, App. A-9.

ARGUMENT

The decision of the Oklahoma Supreme Court in the present case equates child support payments with the payment of Social Security benefits payable on behalf of a minor child, and ignores the clear mandate of federal statutes prohibiting the father from gaining access to the Social Security proceeds with which to satisfy the child support obligation owed by the mother. As such, the holding of the Oklahoma Supreme Court has decided an important question of federal law that has not been, but should be, decided by this Court.

The holding of the Oklahoma Supreme Court is grounded in a premise that child support obligations are subject to equitable defenses. App. at A-7. In reaching this premise, the Oklahoma Supreme Court noted that Congress had established basic requirements for child support requirements for state participation in federally supported child support enforcement. App. at A-6, note 2. However, the Oklahoma Supreme Court has used the language of

equity to eliminate the state plan requirements established by Congress. Specifically, 42 U.S.C. § 654(4)(B)(ii) requires a state's law to enforce a child support obligation owed to a custodial parent. While arguably, the provision only requires the enforcement of support obligations owed to a custodial parent of a child receiving state services, there appears to be no reason to apply a different rule of substantive law to a person who is represented by a state agency as opposed to a person who is represented by a privately retained counsel. The Oklahoma Supreme Court's decision eliminates the certainty sought to be achieved by Congress in its enactment of national guidelines for the collection of child support obligations and raises important issues of federal law that have not been, but should be, decided by this Court.

Last term, this Court decided *Washington Dept. of Social and Health Srvcs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). At issue there was whether the Washington agency providing services to children could use Social Security benefits received on the children's behalf to offset costs incurred in providing the services to the children without violating 42 U.S.C. § 407(a). Now the Oklahoma Supreme Court has determined in this case that, because Social Security benefits have been paid, the support obligation of the disabled parent is discharged, without regard to whom the support obligation is owed. If permitted to stand, the decision of the Oklahoma Supreme Court has the potential to undermine the holding of this Court in those instances where the Social Security benefits are paid to anyone other than the state administrative agency, even if the state administrative agency would have otherwise been entitled to receive the Social Security benefits.

The import of 42 U.S.C. § 407(a) is clear: Social Security payments are not subject to appropriation by someone for the payment of child support obligations, unless the person to whom the payments are made has an obligation for support that is outstanding and unpaid. Here, the mother had an outstanding and unpaid child support obligation, but the child to whom the Social Security benefits were paid did not. The trial court sought to impose an obligation on the child to provide the father with the mother's errant child support from the Social Security benefits paid to the child, and refused to relent when it was shown that the Social Security benefits were not subject to any claim by the father. While the Oklahoma Supreme Court has couched its decision in terms of equity, "we will not require a disabled party on Social Security to pay a second time," App. at A-10, the decision of the Oklahoma Supreme Court expressly ignores the claim of the father that he has not been paid a first time, App. at A-4, note 1, and effectively negates the mother's child support obligation. The issue is correctly, not whether the obligor made a payment, but whether the obligee received a payment.

In reaching its conclusion, the Oklahoma Supreme Court cited its 1981 case of *Nibs v. Nibs*, 625 P.2d 1256, for the proposition that, "Social Security benefits are not gratuitous, but are earned, and they constitute, in effect, insurance payments substituting for last earning power.... It is therefore equitable to substitute Social Security benefits for child support for the period during which such benefits are paid." App. at A-10. The state courts have had great difficulty in applying Social Security benefits to child support obligations. See, *Wilson v. Stenwall*, 868 P.2d 1317 (Okla. App. 1992) (reciting courts nationally that have reached differing results in the application of Social

Security benefits to child support obligations). But in no case has counsel found a case where Social Security benefits were payable to someone other than one of the parties, and the non-custodial parent was still entitled to claim the payments as a credit against owed child support.

Review of the Oklahoma Supreme Court decision through a writ of certiorari will result in a uniform application of Congressionally mandated child support enforcement nationwide.

Respectfully submitted,

CHARLES GAUNCE, Attorney at Law
(*Counsel of Record*)
Attorney for Petitioner Michael L. Merritt

September 26, 2003

2003 OK 68

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

JANE A. MERRITT, Appellee,	)	
v.	)	No. 95,742 FOR OFFICIAL PUBLICATION
MICHAEL L. MERRITT, Appellant.	)	(Filed Jul. 1, 2003)

ON CERTIORARI TO THE COURT OF
CIVIL APPEALS, DIVISION III

¶ 0 One day before their child turned eighteen years of age, the appellant, Michael L. Merritt, filed an action for indirect contempt against the appellee, Jane A. Merritt, for failure to pay $5,400.00 in back child support. He also moved that the arrearage be reduced to judgment. Some months later at the hearing, the trial court found that the mother had been disabled since May of 1997, and that after the child attained majority, the Social Security Administration paid $13,101.00 and a monthly payment of $355.00 to the son as a consequence of his mother's disability. The trial court concluded that the payments purged the mother's contempt and ruled that the father should seek reimbursement of the $5,400.00 of unpaid child support from his adult son. The Court of Civil Appeals reversed.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; JUDGMENT OF THE TRIAL COURT AFFIRMED

Charles Gaunce, Norman, Oklahoma, for appellant.

Silas C. Wolf, Jr., Norman, Oklahoma, for appellee.

WINCHESTER, J.

¶1 The appellant, Michael L. Merritt, filed an application for an indirect contempt citation and a motion to reduce arrearage to judgment. The appellee, Jane A. Merritt, filed a motion to dismiss the contempt citation based on the payment of Social Security benefits to the child of the parties. The Social Security payment made subsequent to the commencement of this action exceeded the amount of the arrearage. After finding that the payment purged the contempt, the trial court granted the appellee's motion to dismiss. The appellant filed a "motion to reconsider," which the trial court denied. The appellant filed an appeal that was subsequently assigned to the Court of Civil Appeals, Division III. That court reversed and remanded. The appellee filed a petition for certiorari, which this Court granted. We vacate the opinion of the Court of Civil Appeals and affirm the judgment of the trial court.

FACTS

¶2 The record reveals that the parties were granted a divorce on October 16, 1987. The trial court subsequently modified the custody provisions for the son of the parties on April 27, 1989, and on December 28, 1994. On the latter date, the court modified the decree by granting sole

custody of the minor child to the appellant (the father). The trial court ordered, pursuant to the Oklahoma Child Support Guidelines, that the appellee (the mother) pay $120.00 per month.

¶3 In 1996, the court further modified the custody provisions by terminating the parental rights of the mother. The father asserts that the action to terminate parental rights was the result of the mother's failure to support their child for over a year. The mother's pleadings assert that the 1996 judgment was obtained by default. The father alleges in his application for an indirect contempt citation that the order for the payment of child support remained in full force and effect. The application alleges that the mother failed to make payments beginning in March 1996, and missed all but two months until he filed his application for contempt on January 31, 2000. He claimed that the mother was indebted to him in the amount of $5,400.00 for child support, plus interest on that amount. The father filed his application one day before the parties' son attained majority.

¶4 The trial court heard the mother's motion to dismiss on November 1, 2000. The court found that the mother had failed to pay the court-ordered child support as alleged by the father. The court further found that the mother had been legally disabled since May 1997, and that the Social Security Administration made a payment of $13,101.00 directly to the child of the parties on June 2, 2000, and had paid $355.00 per month directly to the child of the parties every month since that time. Those payments represented Social Security benefits payable to the child as a result of the mother's disability. The sums were in excess of the sum claimed as delinquent child support

by the father in his application for an indirect contempt citation.

¶5 The court made these findings. Equity required the application of the equitable estoppel doctrine to the father's claim for delinquent child support. The mother's disability, and the Social Security benefit payments of a lump sum and monthly payment made in excess of the delinquent child support supported this decision. The mother was not responsible for the payment of the lump sum directly to the adult child of the parties by the Social Security Administration. The journal entry of judgment stated that the father should seek reimbursement of the child support he sought in his motion from his adult son by having a constructive trust imposed on the benefits paid to the adult son to the extent of the unpaid child support while the child was a minor.[1] The court granted the motion to dismiss the indirect contempt citation and also dismissed the father's motion to reduce arrearage to judgment.

¶6 The Court of Civil Appeals, Division III, cited the 1998 supplement to 43 O.S. § 137, which provides that when an installment of court-ordered child support becomes past due, it becomes a judgment by operation of law. The court concluded that it was inequitable to allow Social Security disability payments on behalf of the mother to the child to extinguish the father's *in personam* judgment for child support.

---

[1] We express no opinion on this *obiter dictum* of the trial court. Although the parties have argued whether or not such a trust may be imposed, this issue is not properly before this Court and does not affect the reasoning in this opinion.

I. STANDARD OF REVIEW

¶7 The trial court stated that its judgment was based on equitable considerations. We have recently reaffirmed that child support proceedings are of equitable cognizance. *Hedges v. Hedges,* 2002 OK 92, ¶ 10, 66 P.3d 364, 370. In *Thrash v. Thrash,* 1991 OK 32, ¶ 9, 809 P.2d 665, 668, we noted that equitable defenses may be invoked to bar the recovery of delinquent child support payments. Those defenses include the equitable doctrines of waiver, estoppel and laches. *Thrash,* 1991 OK 32, ¶ 9, 809 P.2d at 668. When reviewing the decision of the trial court in an equity proceeding, this Court has long held that the judgment will not be disturbed unless the trial court abused its discretion or unless the court's finding was clearly contrary to the weight of the evidence. *Creech v. Creech,* 1956 OK 10, ¶ 9, 292 P.2d 376, 378; *Tschauner v. Tschauner,* 1952 OK 230, ¶¶ 22, 25, 245 P.2d 448, 451.

II. EQUITABLE JURISDICTION

¶8 The trial court based its decision on principles of equity. In 1987, the legislature enacted a new law, codified in the Oklahoma Statutes as § 1291 of Title 12, now 43 O.S.2001, § 137. Section 137(A) provides that "Any payment or installment of child support ordered pursuant to any order, judgment, or decree of the district court or administrative order of the Department of Human Services is, on and after the date it becomes past due, a judgment by operation of law." Except for the rearranging of some commas, the sentence is identical to that which was originally enacted. The Court of Civil Appeals has construed this statute as eliminating equitable defenses to excuse noncompliance with a support order. *Aguero v. Aguero,* 1999 OK CIV APP 38, ¶ 10, 976 P.2d 1088, 1090.

Cowan v. Cowan, 2001 OK CIV APP 14, ¶ 10, 19 P.3d 322, 325-326, relied on *Aguero* to reach the same result.

¶9 In his Response of Michael L. Merritt to Motion to Dismiss Contempt Citation, the appellant argues that he has a series of judgments for unpaid child support as a result of the appellee's failure to make her required child support payments. Appellant cites 43 O.S.2001, § 137, which uses the term "judgment by operation of law." The term "judgment by operation of law" appears to be incorporated into Oklahoma's statutes as a result of a requirement by Congress.[2]

¶10 A money judgment is discharged by actual payment in full to a person authorized to receive it. *Hart v. Jett Enterprises, Inc.,* 1985 OK 24, ¶ 6, 744 P.2d 561, 562. Due process requires that an obligor be allowed a hearing for any legally-cognizable defense to an assertion of arrearage. The Supreme Court of Alaska recognized this in *State v. Maxwell,* 6 P.3d 733 (Alaska 2000). That court observed that an alleged obligor be allowed an opportunity for a fair

---

[2] 42 U.S.C. § 654(20)(A) provides that " . . . to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section. . . . " Section 666(a) provides that " . . . each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary. . . . " Section 666(a)(9)(A) provides: "Procedures which require that any payment or installment of support under any child support order, whether order through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due) –

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced. . . . "

and impartial hearing before finalizing and implementing a continuing child support order that would become a series of enforceable judgments. *Maxwell,* 6 P.3d at 737.

¶11 North Dakota likewise recognized this right to a hearing in *Ruscheinsky v. Ulrich,* 2000 ND 133, ¶ 10, 612 N.W.2d 283, 286. There the court noted that simply because obligor's arrearages constituted judgments by operation of law did not necessarily mean that North Dakota's Social Services could collect on the judgments. Pursuant to North Dakota statutes, the claims were subject to a statute of limitations or cancellation by N.D.C.C. § 28-20-35.

¶12 Like support alimony, child support becomes vested at the time each payment becomes due. *Nantz v. Nantz,* 1988 OK 9, ¶ 10, 749 P.2d 1137, 1140. "[A]n action which seeks to recover unpaid installments for child support is an action for a debt created by law and evidenced of record, and is maintainable in the court which directed payment, or any other court of competent jurisdiction. . . . " *Turk v. Coryell,* 1966 OK 194, ¶ 10, 419 P.2d 555, 558.

¶13 Even though the arrearages are judgments by operation of law, they are nevertheless subject to equitable defenses. We have already stated that Oklahoma recognizes equitable defenses. *Hedges,* 2002 OK 92, ¶ 10, 66 P.3d at 370. "[T]he equitable jurisdiction of a district court is not dependent upon specific statutory authorization." *Marley v. Cannon,* 1980 OK 147, ¶ 8, 618 P.2d 401, 404. "The purpose of a court sitting in equity is to promote and achieve justice with some degree of flexibility." *Garrett v. Arrowhead Improvement Ass'n,* 826 P.2d 850, 855 (Colo.1992). Therefore, the trial court's exercise of equitable

jurisdiction requires an inquiry into the particular circumstances of the case. *Garrett,* 826 P.2d at 855. There is a legal maxim that equity must follow the law; it will not allow legal limitations to be abridged unless there are equitable considerations of a compelling nature. *Hedges,* 2002 OK 92, ¶ 8, 66 P.3d 364, 370. Equity will follow both the letter and the spirit of the law.

¶14 Pursuant to the standard of review, we must examine the record to determine if the trial court abused its discretion or if its findings were clearly contrary to the weight of evidence. In concluding that equitable estoppel applied, the trial court specifically considered the mother's disability, the fact that Social Security paid an amount in excess of the arrearage, and that the mother was not responsible for Social Security's decision to pay the adult son.

¶15 Equitable estoppel is employed to prevent one party from taking a legal position inconsistent with an earlier action that places the other party at a disadvantage. *First State Bank v. Diamond Plastics Corp.,* 1995 OK 21, ¶ 39, 891 P.2d 1262, 1272. Equitable estoppel holds a person to a representation made, or a position assumed, where otherwise inequitable consequences would result to another, who has in good faith, relied upon that representation or position. *Oxley v. General Atlantic Resources, Inc.,* 1997 OK 46, ¶ 20, 936 P.2d 943, 947. In the case at bar, the representation or position assumed must be the amount of time the father delayed before filing for his application for an indirect contempt citation and motion to reduce arrearage to judgment.

¶16 Both estoppel and the equitable defense of laches share the elements of delay and resulting prejudice to the

other party. In *Hedges,* cited above, this Court found that a ten-year delay was not sufficient to support a laches defense where the only prejudice that could be shown was the fact that the party owing the arrearage must now pay the accrued interest along with the arrearage. *Hedges,* 2002 OK 92, ¶ 11, 66 P.3d at 370. In the case at bar, the mother is alleged to have failed to pay child support for three years and nine months. Concerning resulting prejudice from a delay in enforcement, the mother could claim to be prejudiced by the fact that the father's delay resulted in the Social Security Administration's paying the parties' adult child instead of paying the father. But she cannot claim that her failure to pay child support was in good faith. Also, there is no evidence that the father has taken now a legal position inconsistent with his earlier action. The evidence is insufficient to support the conclusion of the trial court that equitable estoppel applies.

¶17 But to affirm the decision of the trial court, it is not necessary for this Court to agree with the reason for the decision. "It is a settled rule of appellate review in this jurisdiction that a judgment, if correct, must stand, regardless of the correctness of the reasons, theory or conclusions upon which it was based." *McDaniel v. McCauley,* 1962 OK 72, ¶ 10, 371 P.2d 486, 489, quoting *Duncan v. Golden,* 1957 OK 194, ¶ 6, 316 P.2d 1116, 1118.

¶18 The judgment of the trial court is based on an assumption that Social Security disability benefits may be credited for court-ordered support of a minor child. That assumption is correct. The foundation for crediting disability benefits for a minor child as child support payments was laid in *Nibs v. Nibs,* 1981 OK 25, 625 P.2d 1256. The Court found that the trial court in *Nibs* was within its discretion to credit Social Security payments against a

child support obligation, although the Court held that the evidence in *Nibs* weighed against such a credit. *Nibs,* 1981 OK 25, ¶ 10, 625 P.2d at 1257. The entire *Nibs* court agreed that credit for Social Security disability benefits toward a child support order should be allowed. *Nibs,* 1981 OK 25, ¶ 1, 625 P.2d at 1258 (dissent). "Social Security benefits are not gratuitous, but are earned, and they constitute, in effect, insurance payments substituting for lost earning power. [Citations omitted.] It is therefore equitable to substitute Social Security disability benefits for child support for the period during which such benefits are paid." *Nibs,* 1981 OK 25, ¶ 1, 625 P.2d at 1258 (dissent).

¶19 In the case before us, Social Security benefits have been paid for child support. The amount paid was in excess of that owed as an arrearage. The mother is entitled to credit for that payment. The trial court found that the mother was not responsible for the lump sum payment directly to the adult child of the parties. In balancing the equities, we will not require a disabled party on Social Security to pay a second time. *McNeal v. Robinson,* 1981 OK 43, ¶ 13, 628 P.2d 358, 360. We do not find an abuse of discretion in the decision of the trial court.

III. ATTORNEY FEES

¶20 The trial court granted the mother's motion for attorney fees, and awarded the mother $1,175.00. The father appeals from that award. *Thielenhaus v. Thielenhaus,* 1995 OK 5, 890 P.2d 925, 934-935, reiterated the rule, established by 43 O.S.2001, § 110(C), that either spouse may be required to pay the reasonable expenses of the other in the prosecution or defense of the action. The

trial court must take into account what is just and equitable considering the respective parties and the means and property of each. Attorney fees are granted only to that litigant who qualifies for the benefit through the process of a judicial balancing of the equities. The court's decision will not be disturbed on appeal in the absence of an abuse of discretion. *Hester v. Hester,* 1983 OK 50, ¶ 7, 663 P.2d 727, 729. We do not find an abuse of discretion in the trial court's decision.

CERTIORARI PREVIOUSLY GRANTED; COURT OF CIVIL APPEALS OPINION VACATED; JUDGMENT OF THE TRIAL COURT AFFIRMED.

CONCUR: WATT, C.J., LAVENDER, KAUGER, SUMMERS, WINCHESTER, JJ.

CONCUR IN RESULT: HARGRAVE, J.

CONCUR IN PART; DISSENT IN PART: OPALA, V.C.J., HODGES (who joins OPALA), BOUDREAU, JJ.

Opala, V.C.J., dissenting in part.

I *concur* in affirming the trial court's order that exonerates Mother of liability for child support arrearage; I *dissent* from leaving undisturbed the trial court's order that imposes on Father the liability for payment of Mother's counsel-fee services. I would let each party bear its own expenses for legal representation in the case.

2003 OK 68

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

JANE A. MERRITT, Appellee, v. MICHAEL L. MERRITT, Appellant.	)))))))	No. 95,742 FOR OFFICIAL PUBLICATION (Filed Jul. 1, 2003)

BOUDREAU, J., concurring in part, dissenting in part:

¶1 I agree with the majority opinion to the extent it allows the mother an equitable credit against her child support obligation, in the amount of social security disability payments which the Social Security Administration paid directly to the child as a consequence of the mother's disability.[1] The majority opinion need not have gone farther than that. Instead, the majority opinion proceeds to make a hyper-global pronouncement by way of *obiter dicta* that child support judgments are subject to the equitable defenses of waiver, estoppel and laches.

¶2 In *Hedges v. Hedges,* 2002 OK 92, 66 P.3d 364, our most recent decision concerning the availability of equitable defenses to child support judgments, we

---

[1] This is consistent with the holding of *McNeal v. Robinson,* 1981 OK 43, 628 P.2d 358. In *McNeal,* we held that the non-custodial father should receive an equitable credit for his alternative compliance with the child support order. He received credit for the payments made by him during the time his children lived with him.

restrained from making a pronouncement about the availability of equitable defenses to child support judgments because no such pronouncement was necessary to the holding. *See also Myers v. Lashley,* 2002 OK 14, ¶ 17, 44 P.3d 553, 561 (not making global pronouncements). In exercising this restraint in *Hedges,* we said: "We need not *globally* address ourselves today to the *continued invocability* of laches as an equitable defense in arrearage enforcement proceedings. This is so because, on this record, we hold that it does not avail in this case." *Hedges,* 66 P.3d at 369 (emphasis in original). Contrary to what we did in *Hedges,* the majority opinion in this case makes an across-the-board pronouncement on an issue that was neither necessary to the holding nor clearly framed by the parties.

¶3 If the holding of the majority opinion in this case is indeed that child support judgments are subject to the equitable defenses of waiver, laches and estoppel, then I dissent. In 1987 the Legislature enacted a statute that says a child support obligation becomes a judgment by operation of law on the date it becomes past due. 43 O.S. 2001 § 137(A).[2] The result of that statute was to transform an order in equity for the payment of continuing child support into a judgment by operation of law as each installment falls due and remains unpaid. *Hedges,* 66 P.3d at 373 n. 41. When § 137(A) is viewed in connection with

---

[2] This provision became effective October 1, 1987, codified at 12 O.S. § 1291(A). Laws 1987, c. 230, § 16. In 1989, 12 O.S. § 1291 was renumbered to 43 O.S. § 137. Laws 1989, c.333 § 1. Section 137 was amended again in 1994, 1996, 1998 and 2000, but none of the amendments altered § 137(A).

subsequent enactments, I am convinced that the Legislature intended to eliminate the equitable defenses of waiver, laches and estoppel to the enforcement of child support judgments.

WAIVER

¶4 It need hardly be repeated that 43 O.S. 2001 § 112 eliminated the equitable doctrine of waiver as a defense to the enforcement of child support judgments. In *Hedges* we recognized that with the enactment of § 112, parents have statutory authority to mutually agree to relinquish payment of all or a portion of past due child support. Noting that the effect of § 112 was to eliminate the equitable defense of waiver in this context, we said: "[T]he latter defense characterized by the parties and by the trial court as 'waiver' is [now] statutorily declared . . . its effectiveness stands *limited to matured and unpaid installments* either reduced or relinquished by mutual agreement." *Hedges,* 66 P.3d at 369 (emphasis in original). Waiver as a defense to child support judgments is now restricted to the terms of § 112(A)(3).

LACHES

¶5 We have held that laches is an affirmative defense to *stale* claims not yet barred by limitations. *Hedges,* 66 P.3d at 369; *Sooner Federal Sav. & Loan Ass'n. v. Smoot,* 1995 OK 31, 894 P.2d 1082. Laches is defined as delay that disadvantages another. *Hutchinson v. Pfeil,* 105 F.3d 562, 564 (10th Cir.), *cert. denied,* 522 U.S. 914 (1997). In 1996 the Legislature enacted new laws concerning delay in asserting child support claims. The new statutes provide, among other things:

A child support judgment is not subject to a statute of limitations:

> Court-ordered child support is . . . not subject to a statute of limitations. 12 O.S.2001 § 95(9).[3]

A child support judgment never becomes dormant:

> A child support judgment shall not become dormant for any purpose, except that it shall cease to be a lien on real property five (5) years from the date it is filed.... 43 O.S.2001 § 137(B).[4]

A child support judgment is enforceable until paid in full:

> Except as otherwise provided by court order, a judgment for past due child support shall be enforceable until paid in full. 43 O.S. 2001 § 137(B)(1).[5]

---

[3] This provision became effective September 1, 1996. Laws 1996, c. 233 § 1. Section 95 was amended again in 2002, but the amendment did not alter § 95(9).

[4] This provision became effective November 1, 1996 and was codified at 43 O.S. § 137(C). Laws 1996, c. 233 § 3. Section 137 was amended again in 1998 and 2000. Neither the 1998 nor the 2000 amendment altered the quoted language, but the 1998 amendment renumbered § 137(C) to § 137(B). Laws 1998, c. 323 § 12.

[5] This provision became effective November 1, 1996 and was codified at 43 O.S. § 137(C)(1). 1996 Laws c. 233 § 3. Section 137 was amended again in 1998 and 2000. Neither the 1998 nor the 2000 amendment altered the quoted language, but the 1998 amendment renumbered § 137(C)(1) to § 137(B)(1).

A child support judgment is owed until it is paid:

> Court-ordered child support is owed until it is paid. . . . 12 O.S. 2001 § 95(9).[6]

¶6 Because these statutes are in derogation of common law, they must be liberally construed to effect their purpose. *Finnell v. JEBCO Seismic,* 2003 OK 35, ¶ 15, 67 P.3d 339, 345; *see also* 25 O.S. 2001 § 29.[7] The purpose of these statutes is to ensure that delay on the part of the obligee in seeking to enforce child support obligations does not in any way affect his or her entitlement to those obligations. Construing these statutes liberally to effect their purpose, I am convinced the Legislature, in enacting these various statutes, intended to eliminate the equitable defense of laches to the enforcement of child support judgments.

ESTOPPEL

¶7 Equitable estoppel holds a person to a representation made, or a position taken, where otherwise inequitable consequences would result to another who in good faith relied upon the representation or position. *Oxley v. General Atlantic Resources, Inc.,* 1997 OK 46, 936 P.2d 943, 947. Estoppel and waiver are closely akin and their legal effect is much the same. *Grant v. Norris,* 85 N.W.2d

---

[6] This provision became effective September 1, 1996. Laws 1996, c. 233 § 1. Section 95 was amended again in 2002, but the amendment did not alter § 95(9).

[7] "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice." 25 O.S. 2001 § 29.

261 (Iowa 1957); *First National Bank of Hastings v. Davis,* 242 N.W. 655 (1932); *Woodmen of the World Life Ins. Soc. v. Greathouse,* 7 So.2d 89 (Alabama 1941). Although there are well recognized distinctions between the two doctrines, both are based on acts, conduct or declarations of the party against whom the defenses are asserted. In my view, 43 O.S. 2001 § 112, which prohibits (with a single exception) waiver of "payment of all or a portion of the past due amount [of child support]" applies to all acts, conduct or declarations relating to child support obligations, whether denominated waiver or estoppel. I am convinced the Legislature, in enacting this statute, intended to eliminate the equitable defense of estoppel to the enforcement of child support judgments.

THRASH v. THRASH

¶8 The majority opinion relies on *Thrash v. Thrash,* 1991 OK 32, 809 P.2d 665, for the across-the-board proposition that equitable defenses may be invoked against the enforcement of child support judgments. In *Thrash,* the parties' divorce decree provided that father was to pay $220 per month child support until his gross salary reached $1,500, at which time he was to pay child support in an amount equal to 15% of his gross salary. In 1987, mother filed an application for contempt citation alleging that father was in arrears for child support in the amount of $31,876.80, based upon his income tax returns for the years through 1986. The trial court found father not guilty of indirect civil contempt, but entered judgment against father for the arrearage. On appeal, father argued that since mother made no attempt to enforce the automatic increases in child support based on his gross salary from

the time the parties were divorced until 1987, the equitable doctrines of waiver, laches and estoppel barred mother's recovery of the arrearage. We disagreed, saying: "No set of facts has been stated for this Court to conclude that the appellant may in this case defeat the claim for the arrearage by interposing equitable defenses." *Thrash,* 809 P.2d at 668. In reaching this decision, we made a gratuitous comment regarding the availability of equitable defenses. We said: "The appellant is correct in concluding that equitable defenses may be invoked to bar the recovery of delinquent child support payments." *Id.* This comment was certainly not essential to our holding in the case and is mere *obiter dicta.*

¶9 More importantly, *Thrash* was decided in 1991, and was based on pre-1987 child support arrearages. Thus, it was decided *before* 43 O.S. § 137(A) transformed an order in equity for the payment of continuing child support into a judgment by operation of law as each installment falls due and remains unpaid, and *before* the Legislature made child support judgments enforceable until paid in full, with no statute of limitations and no dormancy.

CONCLUSION

¶10 I agree with the majority opinion to the extent it allows the mother an equitable credit against her child support obligation, in the amount of social security disability payments which the Social Security Administration paid directly to the child as a consequence of the mother's disability. However, I dissent to that portion of the opinion that holds that the equitable defenses of waiver, estoppel and laches are available as defenses to the enforcement of

child support judgments because the pronouncement was not necessary to the holding and because I think it is wrong.

¶11 If this Court is going to declare that these equitable defenses may be invoked as defenses to the enforcement of child support judgments, we should do it in a case in which such declaration is essential to the holding of the case, and our opinion should include a reasoned discussion of all relevant statutory enactments subsequent to 1986.

THIS OPINION HAS BEEN RELEASED
FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA

DIVISION III

JANE A. MERRITT,	)	Case No. 95,742
Plaintiff/Appellee,	)	(Filed May 17, 2002)
vs.	)	
MICHAEL L. MERRITT,	)	
Defendant/Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE TOM LUCAS, JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Charles Gaunce,
Norman, Oklahoma, For Defendant/Appellant,

Silas C. Wolf, Jr.,
Norman, Oklahoma For Plaintiff/Appellee.

OPINION BY BAY MITCHELL, JUDGE:

¶1 In this post-divorce proceeding Michael A. Merritt, Defendant/Appellee (Father), filed an application for indirect contempt against Jane A. Merritt, Plaintiff/Appellee (Mother), for her failure to pay $5,400.00 in back child support ($120 per month) x 45 months). He also sought to reduce the arrearage to judgment and requested attorney fees as well. This application was

filed before the child reached the age of majority. Subsequently, because of an undisclosed disability of Mother, the child, who had by then reached the age of eighteen, received a lump sum social security disability payment in the amount of $13,101.00 and $365.00 per month thereafter. Mother argued that this purged her unpaid child support obligation. The trial court agreed, dismissed Father's action, denied a motion to reconsider and awarded Mother an attorney fee of $1,175.00.

¶2 The parties were divorced in 1987. The decree provided for joint custody of the child. In December 1994, the decree was modified with Father being awarded sole custody. At that time Mother was ordered to pay child support in the amount of $120.00 per month. In 1996 Mother's parental rights were terminated. Her child support obligation was apparently left undisturbed and was continued to accrue.

¶3 The instant action was brought by Father in January, 2000. At a hearing in November, 2000, the trial court found mother to have been disabled since May, 1997. It was determined that the child had turned eighteen on February 1, 2000. The court found that on June 2, 2000, the Social Security Administration paid $13,101.00 directly to the child and $355 per month thereafter also to the child. These payments were made as a result of Mother's disability. The trial court concluded that because Mother was now disabled and because social security had paid more than enough to purge her child support arrearage, the doctrine of equitable estoppel precluded Father's claim. The trial court further concluded that Father "should seek reimbursement of the [$5,400 in unpaid] child support . . . from his [now] adult son . . . ".

¶4 On appeal, Father contends the trial court erred in concluding Father's remedy for back child support was against the adult child; that it was not equitable to credit the social security payments to the child against Mother's back support obligation when Father had been given no notice that such social security benefits were available; and that Mother's back child support obligation was not purged by the social security payments made directly to the child.

STANDARD OF REVIEW

¶5 Although child support proceedings are matters of equitable cognizance, see ***Thrash v. Thrash***, 1991 OK 32, 809 P.2d 665, this is an appeal of an order denying an application for contempt. In reviewing a denial of an application for contempt, only questions of law may be considered. ***Torres v. Torres***, 1998 OK CIV APP 18, 956 P.2d 166, 168; ***Cowan v. Cowan***, 2001 OK CIV APP 14, 19 P.3d 322, 327. Questions of law of course, are reviewed *de novo*. ***Kluver v. Weatherford Hospital Authority***, 1993 OK 85, 859 P.2d 1081, 1084.

ANALYSIS

¶6 In Oklahoma, a similar issue was considered in ***Baker v. Baker***, 1996 OK CIV APP 97, 923 P.2d 1198. In ***Baker***, the non-custodial father moved to modify his child support obligation on the ground that the children were now receiving benefits directly from the Social Security Administration due to his retirement. These benefits were in the same amount as his child support obligation, and because of that, Father believed the benefits should satisfy

his personal obligation to pay support. The trial court agreed as did the appellate court. It held:

> In effect, the payments are insurance payments derived from the wage earner and are substituting for his lost earning power. Social Security benefits are analogous to private insurance, where a parent insures against his ability to fulfill moral and legal obligations due his minor children. The payments are a direct result of the earnings and payments of the parent through his prior employment. (citing ***Wilson v. Stenwall***, 1992 OK CIV APP 34, 868 P.2d 1317).

Id. at 1199.

¶7 ***Baker*** is distinguishable from the case before us. In the instant case, Mother did not move to modify but rather ignored her child support obligation until Father sought to have her held in indirect contempt seeking payment for the amounts he was due for back child support. Another distinguishing fact is that here the child support had been allowed to accrue in excess of $5,000.00, where in ***Baker*** the non-custodial father proactively sought to modify his child support amount.[1]

---

[1] See also, ***Nibs v. Nibs***, 1981 OK 25, 625 P.2d 1256, where Father was **not** allowed credit against his child support obligation for social security disability payments for the benefit of the minor children due to Father's disability. Father was disabled and his wife and four children had been receiving disability benefits for seven years **prior to the divorce**. The Supreme Court held that the court granting the divorce had the discretion to consider the social security payments as a credit against the child support obligation, and that it appeared the divorce court had considered it and decided that credit should not be given.

¶8 Title 43 O.S. Supp. 1998 § 137 (since amended) provides that when each installment of court-ordered child support becomes past due, it becomes a judgment by operation of law, as the full force and effect of any other judgment of this state and may be enforced by any means available under Oklahoma law. Thus, since March, 1996, when the child support arrearage began, Father has had an ever-increasing judgment against Mother by operation of law. It is inequitable to allow the social security payment, although representative of payments due while the child was a minor but paid by lump sum directly to child after child had reached the age of majority, to stand in the stead of Mother's obligation. To do so would be retroactively excusing Mother's indebtedness and nullifying Father's *in personam* judgment against Mother. There is no equity in such result.

¶9 The Trial court concluded that the social security disability payments to the now adult child purges Mother's arrearage and, in effect, relieves Mother from any further liability to Father on his judgment for that arrearage. However, no authority has been identified that can fairly be interpreted as endorsing that effect. The result would likely be different if Father had received from the social security disability payments the $5,400 he was owed. The result would also likely be different if there was unaccrued child support not yet due and owing. In that event, Mother would arguably be entitled to set off the amount paid by social security to child, (or to Father on child's behalf), against her future support obligations.

¶10 Further, it is not only inequitable to require Father to seek reimbursement from the adult child of what is owed by Mother, federal law would not allow it. Title 42 U.S.C.A. § 407 provides in pertinent part:

> (a) The right of any person to any future payment under this subchapter [Federal Old-Age, Survivors, and Disability Insurance Benefits] shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable . . . shall be subject to execution, levy, attachment, garnishment or other legal process . . .
>
> (b) No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supercede, or otherwise modify the provisions of this season except to the extent that it does so by express reference to this section. . . . "

¶11 Father contends the court erred by awarding attorney fees to Mother. In light of our conclusions herein, we agree.

¶12 The orders appealed are reversed, and this case is remanded to the trial court with directions to proceed on Father's Application for Indirect Contempt and Motion to Reduce Arrearage to judgment consistent with the views expressed herein.

¶13 REVERSED AND REMANDED WITH DIRECTIONS.

HANSEN, P.J., and BUETTNER, J., concur.

In the District Court of Cleveland County
State of Oklahoma

JANE A. MERRITT,	)	
Plaintiff,	)	
vs.	)	**No. JFD-87-922-L**
MICHAEL L. MERRITT,	)	
Defendant.	)	

Order

(Filed Dec. 14, 2000)

This action comes before the Court for consideration of the Defendant's Motion to Reconsider the Courts Journal Entry of Judgment filed on November 16, 2000. The Court has heard arguments of counsel and read the briefs submitted. Upon consideration of the record before it, the Court hereby denies the Defendant's Motion to Reconsider.

Dated this 14th day of December, 2000.

s/ Tom A. Lucas
Judge of the District Court

Approved:

/s/ Silas Wolf
Silas Wolf, Jr. –
OBA #9819
Attorney for Plaintiff
111 North Peters,
Suite 100
Norman, OK 73069
(405) 329-1115

/s/ Charles Gaunce

Charles Gaunce –
OBA #10817
Attorney for Defendant
222 East Main Street
Norman, OK 73069
(405) 447-4144

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND, CORRECT AND COMPLETE COPY OF THE INSTRUMENT HEREWITH SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE OF CLEVELAND COUNTY, OKLAHOMA WITNESS MY HAND AND SEAL THIS 14 DAY OF DECEMBER, 2000, RHONDA HALL, COURT CLERK

BY /s/ David Cryer
Deputy

IN THE DISTRICT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

JANE A. MERRITT,	)	
Plaintiff,	)	
vs.	)	**No. JFD-87-922**
MICHAEL L. MERRITT,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

(Filed Nov. 16, 2000)

On the First day of November, 2000, this action came before the Court for consideration of the plaintiff's Motion to Dismiss Contempt Citation. The plaintiff appeared in person and with her counsel, Silas Wolf, Jr., and the defendant appeared in person and with his counsel, Charles Gaunce. The Court, having read the briefs and arguments of counsel finds and concludes as a matter of law as follows:

1. Plaintiff has failed to pay Court ordered child support as alleged in paragraph 4 of the defendant's Application for Indirect Contempt Citation.

2. The plaintiff has been legally disabled since May of 1997.

3. The child of the parties was born February 1, 1982, and is presently attending Norman North High School.

4. The Social Security Administration has made payment of $13,101.00 directly to the child of the parties

on June 2, 2000, and has paid $355.00 per month directly to the child of the parties every month since that time. These payments by the Social Security Administration represent Social Security benefits payable to the child as a result of the plaintiff's disability. The sums paid by the Social Security Administration to the adult child of the parties are in excess of the sum claimed as delinquent child support by the defendant in his Application for Indirect Contempt Citation.

5. Equity requires the application of the Equitable Estoppel Doctrine to the defendant's claim for delinquent child support for the reason that the plaintiff is presently disabled and the Social Security Administration is paying a sum in excess of the Court ordered child support to the adult child of the parties every month, and further for the reason that the lump sum payment made by the Social Security Administration to the adult child of the parties was more than sufficient to purge the plaintiff's child support arrearage.

6. The plaintiff is not responsible for the erroneous payment of the lump sum Social Security benefit directly to the adult child of the parties by the Social Security Administration and the defendant should seek reimbursement of the child support he seeks from his adult son by having a constructive trust imposed upon the Social Security benefits paid to the adult child to the extent of the unpaid child support while the child was a minor.

Accordingly, it is the finding of this Court that plaintiff's Motion to Dismiss Contempt Citation should be sustained and the defendant's Application for Indirect Contempt Citation and Motion to Reduce Arrearage to Judgment is hereby dismissed in all respects.

Dated this 15 day of November, 2000.

S/Tom A. Lucas
Judge of the District Court

Approved for Entry:

/s/ Silas C. Wolf
Silas C. Wolf, Jr. –
OBA# 9819
111 North Peters, Suite 100
Norman, Oklahoma 73069
(405) 329-1115
Counsel for Plaintiff

/s/ Charles W. Gaunce
Charles W. Gaunce –
OBA# 10817
222 East Main Street
Norman, Oklahoma 73069
(405) 360-3077
Counsel for Defendant

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND, CORRECT AND COMPLETE COPY OF THE INSTRUMENT HEREWITH SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE OF CLEVELAND COUNTY, OKLAHOMA.

Witness my hand and Seal this 16 day of Nov, 2000,

Rhonda Hall
Court Clerk

/s/ Theresa Robertson
(SEAL) Deputy